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In The

Supreme Court of the United States

October Term, 1970

No. 1556

THOMAS E. WHITMORE,

Petitioner,

vs.

CURTIS W. TARR, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

THOMAS E. WHITMORE,
256 No. 116th Court #23,
Omaha, Nebraska, 68154,
Petitioner, Pro Se.

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TO THE HONORABLE WARREN E. BURGER, CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

This is a petition by Thomas E. Whitmore for a writ of certiorari to review a judgment of the United States

Court of Appeals for the Eighth Circuit entered in the above case.

———o———

I. OPINIONS DELIVERED IN COURTS BELOW

The opinion of the District Court is reported in 318 F. Supp. 1279. The Court of Appeals did not write an opinion.

———o———

II. JURISDICTIONAL STATEMENT

The date of the judgment sought to be reviewed is February 24, 1971, and the time of its entry is February 24, 1971. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is Section 1254 of Title 28 of the United States Code.

———o———

III. QUESTIONS PRESENTED

The questions presented for review are:

a. Whether a decree of a District Court of the United States, entered in a class action enjoining the induction into the Armed Forces of members of a specified class of Selective Service registrants, is entitled to res judicata effect in a second action, brought by a member

of such class to enforce the decree of the District Court in the class action.

b. Whether Section 10 (b) (3) of the Military Selective Service Act of 1967 bars preinduction judicial review of the legality of Selective Service Local Board action ordering for induction into the Armed Forces of the United States a registrant entitled, under regulations then in effect, to a mandatory fatherhood deferment.

———o———

IV. STATUTE AND REGULATIONS INVOLVED

The statute of the United States which is involved is the Military Selective Service Act of 1967, 50 U. S. C. App. §§ 451-473 (Supp. V, 1964), more particularly § 6 (h) [50 U. S. C. App. § 456(h)] and § 10 (b) (3) [50 U. S. C. App. § 460 (b) (3)] thereof.

The pertinent provisions of the text of Section 6 (h) of said Act are as follows:

> (h)(1) Except as otherwise provided in this paragraph, the President shall, under such rules and regulations as he may prescribe, provide for the deferment from training and service in the Armed Forces of persons satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning and who request such deferment. A deferment granted to any person under authority of the preceding sentence shall continue until such person completes the requirements for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or attains the twenty-fourth an-

niversary of the date of his birth, whichever first occurs. * * * No person who has received a student deferment under the provisions of this paragraph shall thereafter be granted a deferment under this subsection, * * *.

(h)(2) * * * Except as otherwise provided in this subsection, the President is also authorized under such rules and regulations as he may prescribe, to provide for the deferment from training and service in the Armed Forces of any and all categories of persons who have children, or wives and children, with whom they maintain a bona fide family relationship in their homes. * * *.

The pertinent provisions of the text of section 10(b)-(3) are as follows:

No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided,* That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant.

The regulation of the Selective Service System which is involved is 32 C. F. R. § 1622.30(a) (Jan. 1, 1969 ed. p. 61). The pertinent provisions of the text of section 1622.30(a) are as follows:

(a) In Class III-A shall be placed any registrant who has a child or children with whom he maintains a bona fide family relationship in their home * * *, except

that a registrant who is classified in Class II-S after the date of enactment of the Military Selective Service Act of 1967 shall not be eligible for classification in Class III-A under the provisions of this paragraph.

Regulation section 1622.30(a) was revoked by E. O. No. 11527, April 23, 1970, 35 F. R. 6571. However, this change does not apply to Selective Service registrants, such as the petitioner, who claimed eligibility for the III-A fatherhood deferment prior to that date.

———o———

V. STATEMENT OF THE CASE

This action was brought by the petitioner, Thomas E. Whitmore, to enjoin his induction into the Armed Forces of the United States on the ground that he was not subject to induction because he was entitled under Regulations then in effect (32 C. F. R. § 1622.30 [a]) to a mandatory fatherhood deferment. The basis for federal jurisdiction in the District Court was 28 U. S. C. Section 1331, the action arising under the Military Selective Service Act of 1967, 50 U. S. C. App. §§ 451-471.

On February 27, 1970, in *Gregory v. Hershey,* 311 F. Supp. 1, in the United States District Court for the Eastern District of Michigan (Smith, J.) judgment was rendered in favor of plaintiffs and against the defendants (being the National Director of Selective Service, several State Directors, and several Local Boards), and an order was entered requiring the defendants, their agents, servants, employees, and persons in active concert and par-

ticipation with them, to classify in Class III-A the named plaintiffs and all others similarly situated to the named plaintiffs upon showing that they were members of the class of plaintiffs defined in the Court's order. A copy of the District Court's opinion in *Gregory* is annexed as Appendix "A".

The *Gregory* Court defined the class of plaintiffs as consisting of:

> * * * [A]ll Selective Service registrants who:
>
> (a) have a child or children with whom they maintain a bona fide family relationship in their homes, and
>
> (b) are not physicians, dentists or veterinarians or in an allied specialist category, and
>
> (c) have not received an undergraduate II-S deferment under the Military Selective Service Act of 1967 (50 U. S. C. App. §§ 451-473) * * * but
>
> (d) have received a graduate II-S deferment under said Act * * *.

On April 30, 1970, the petitioner in this case received an order to report for induction on May 24, 1970. The induction date was subsequently postponed until June 12, 1970 at the request of the United States Attorney after the petitioner filed this suit on May 15, 1970. On June 4, 1970, the United States District Court for the District of Nebraska (Urbom, J.) entered an order granting a preliminary injunction preventing the petitioner's induction into the Armed Forces until final disposition of the instant case. On October 22, 1970, the District Court finding the petitioner to be a member of the class of plaintiffs entitled to relief under the *Gregory* decision,

enforced the judgment of the *Gregory* District Court, and entered its judgment and order, granting the petitioner a permanent injunction. The District Court's opinion is annexed hereto as Appendix "B".

An appeal was taken from the judgment of the District Court in this case by the respondents, and on February 5, 1971, the respondents filed in the Court of Appeals for the Eighth Circuit a motion for summary reversal in light of the reversal of the case of *Gregory v. Tarr* by the Court of Appeals for the Sixth Circuit (No. 20,497). In response to the motion of the respondents, the petitioner filed a pleading wherein he requested that the Court of Appeals deny the respondents' motion for summary reversal and, further, moved the Court for an order staying further proceedings in this case pending final determination of the case of *Gregory v. Tarr*. The petitioner's motion was denied and the Court of Appeals vacated the judgment of the District Court and remanded the case for further proceedings in light of the reversal of *Gregory*. The judgment of the Court of Appeals is annexed as Appendix "C" hereto, and a copy of the opinion of the Court of Appeals in *Gregory* is annexed as Appendix "D" hereto.

———o———

VI. REASONS RELIED ON FOR ALLOWANCE OF WRIT

First. The basis for the judgment of the District Court in the instant case was that the judgment of the

District Court in the *Gregory* suit precluded relitigation of the issues raised therein. See 318 F. Supp. at 1286:

> This Court, finding that the questions of validity of the class suit and jurisdiction have been previously litigated, now finds that the parties should be bound to the prior judgment by the principles of res judicata.

A petition for writ of certiorari will shortly be filed in this Court in the case of *Gregory v. Tarr.* The instant case, being dependent on the *Gregory* case, should, it is respectfully suggested, be heard together with the *Gregory* case, and if a writ of certiorari is granted in the *Gregory* case, writ should also issue in the instant case. Petitioner, in the instant action, being a member of the class of plaintiffs in the *Gregory* action, is no less entitled to relief in this court than other members of the class. Moreover, while in its present posture the instant case raises slightly different issues than does the *Gregory* case, the essence of both cases is identical. To fully settle the instant case, the Court need go but one step further than in *Gregory;* this Court need only reaffirm the principle that the judgment in a true class action suit operates, by principles of res judicata, to preclude relitigation of issues therein decided. *Supreme Tribe of Ben-Hur v. Cauble,* 255 U. S. 356, 367 (1921) ("If the federal courts are to have the jurisdiction in class suits to which they are obviously entitled, the decree when rendered must bind all of the class properly represented.") *See also* Restatement of Judgments, § 86 (1942). Although the Court of Appeals did not venture an opinion on this latter issue, the issue of the res judicata effect

of the *Gregory* judgment was fully briefed and argued in the District Court, which in its opinion discussed in a scholarly and lucid manner the application of the principles of res judicata to the instant case.

Because the instant case, in its present posture, is wholly dependent upon the final outcome of the *Gregory* suit in this Court, the petitioner here relies upon the reasons advanced in the petition for writ of certiorari shortly to be filed in this Court by the plaintiffs-appellees in that case. Briefly stated, the reasons to be advanced in the *Gregory* petition are that:

(a) The Court of Appeals for the Sixth Circuit in its decision failed to observe the mandatory-discretionary distinction announced in *Oestereich v. Selective Service System Local Board No. 16,* 393 U. S. 233 (1968), and *Breen v. Selective Service System Local Board No. 16,* 396 U. S. 460 (1970), with respect to the application of section 10 (b) (3) of the Act to the *Gregory* case. Under *Oestereich* and *Breen,* preinduction judicial review of the classification of a Selective Service registrant is available notwithstanding section 10 (b) (3), where the action of the Selective Service System is contrary to a mandatory, nondiscretionary provision in the Act or Regulations thereunder.

(b) In rejecting the mandatory-discretionary distinction as to section 10 (b) (3), the decision of the Court of Appeals for the Sixth Circuit conflicts with decisions of other Circuit Courts which hold that preinduction judicial review is available when a local board has denied a deferment mandated by applicable law, e. g., the I-S cases, exemplified by *Bowen v. Hershey,* 410 F. 2d 962 (1st Cir. 1969).

(c) The Court of Appeals' decision in *Gregory* is contrary to decisions rendered by the Third Circuit in *Hunt v. Local Board No. 197,* No. 18,076 (February

5, 1971) and several District Courts on identical issues; the decision is contrary to the views expressed by several Circuit Courts and several District Courts, in the closely analogous "I-S" cases. Moreover, the Court of Appeals' decision in *Gregory* ignores, contrary to applicable decisions of this Court, an express finding by the District Court that, if 32 C. F. R. § 1622.30 (a) be taken as denying the III-A fatherhood deferment to registrants who have previously held only *graduate* as opposed to *undergraduate* student deferments, that it was promulgated under a mistake of law that section 6 (h) (1) of the Act prohibits such deferments.

(d) The lower court opinions (over 150 since *Oestereich* was decided) exhibit considerable confusion and inconsistency over the extent of the exception to section 10 (b) (3) carved by *Oestereich* and later *Breen*. The more recent cases, decided since *Breen*, still show no emerging consensus. Because of the continued confusion of the lower courts and the "serious constitutional questions" potentially affecting all Selective Service registrants, it is respectfully suggested that the Court of Appeals in *Gregory* has decided an important question of federal law which has not been, but should be settled by this Court.

VII. CONCLUSION

Wherefore, Thomas E. Whitmore, Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in the above-entitled cause.

Respectfully submitted,

THOMAS E. WHITMORE,

Pro Se.

OPINION

TALBOT SMITH, District Judge.

This case comes before us on a complaint for declaratory judgment, and other relief, arising under the Selective Service Act of 1967, Pub.L. 90–40, June 30, 1967 (81 Stat. 100, 50 U.S.C.App. §§ 451–471), hereinafter termed "the Act." We are now ruling upon a Motion for Summary Judgment (Rule 56(a), Rules of Civil Procedure.)

The named plaintiffs bring the action in their own behalf and on behalf of a class (Rule 23, Federal Rules of Civil Procedure), namely, Selective Service registrants who are fathers and who have received a deferment since June 30, 1967 as post-baccalaureate students pursuing a full-time course of instruction at a college, university, or similar institution of learning, under Section 6(h) (2) of the Act (this deferment being a "graduate II–S"). These plaintiffs have not, however, received prebaccalaureate deferments ("undergraduate II–S's") since June 30, 1967. They have all been denied fatherhood III–A deferments by the Selective Service System.[1] They assert that they are entitled to such deferment under the Act and Regulation as a matter of right, and that the denial of such deferment is an illegal action by the Selective Service System founded upon an erroneous interpretation of the law. They have exhausted their administrative remedies, and have received orders to report for induction.

The plaintiffs before us in person are generally in like positions with respect to the draft and to their education. They are graduate students. They are well along in preparation for their chosen professional careers. They are married (and, with one exception, prior to the effective date of the Act), are fathers, and have incurred the substantial financial obligations that are today's usual concomitant of advanced educational and professional training. In addition, there are significant health problems with respect to the families of some, but not all, of the plaintiffs, although not of such magnitude, in defendants' judgment, as to warrant the grant to the involved plaintiffs of hardship III–A deferments under Regulation 1622.30(b).

We turn at once to the Regulation in question, 1622.30(a). It provides in pertinent part as follows:

> 1622.30 "(a) In Class III–A shall be placed any registrant who has a child or children with whom he maintains a bona fide family relationship in their home and who is not a physician, dentist or veterinarian, or who is not in an allied specialist category which may be announced by the Director of Selective Service after being advised by the Secretary of Defense that a special requisition under authority of section 1631.4 of these regulations will be issued by the delivery of registrants in such category, except that a registrant who is classified in Class II–S after the date of enactment of the Military Selective Service Act of 1967 shall not be eligible for classification in Class III–A under the provisions of this paragraph."

Similarly, Section 6(h) (1) of the Act provides in part as follows:

> "No person who has received a student deferment under the provisions of this paragraph shall thereafter be granted a deferment under this subsection, nor shall any such person be granted a deferment under subsection (i) of this section if he has been awarded a baccalaureate degree, except for extreme hardship to dependents (under regulations governing hardship deferments), * * *"

Subsection 6(h) (2) of the Act provides in part as follows:

> "Except as otherwise provided in this subsection, the President is also

1. See, Act § 6(h) (2); Regulation 1022.30(a).

authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service in the Armed Forces of any or all categories of persons who have children, or wives and children, with whom they maintain a bona fide family relationship in their homes."

The question before us concerns the proper meaning and interpretation of the quoted portions of the Act and the Regulations. This, in turn, requires an examination of the statutory scheme of the Act. In Carey v. Local Board, D. C., 297 F.Supp. 252, aff'd 2 Cir., 412 F.2d 71, the Act was analyzed in the following terms:

"Section 6(h) (1) of the Act, 50 App.U.S.C. § 456(h) (1), directs that the President shall provide for the granting of deferments to students who are satisfactorily pursuing a full time course of instruction in a college at the undergraduate level. This statutory undergraduate deferment continues until the student receives a baccalaureate degree or reaches age twenty-four, whichever occurs earliest. This subsection has no predecessor in the earlier selective service acts. It was enacted in 1967 and became effective on June 30, 1967. Pursuant to 32 C.F.R. § 1622.25, students in this category are classified as II–S (undergraduate II–S deferment.)

"Another category of deferments is provided for in § 6(h) (2) of the Act. This section includes an authorization for the President to provide by regulation for the deferment of graduate students whose deferment he considers essential to the national interest. This section was also enacted with the 1967 amendments, but an almost identical provision was present in the 1948 and 1951 Acts. Section 6(h) of those earlier Acts authorized the President to provide for the deferment of both graduate and undergraduate students, there having been no equivalent in those Acts to the mandatory deferment of undergraduates now found in the current § 6(h) (1). Graduate students deferred under the President's rule-making power are also classified as II–S under 32 C.F.R. § 1622.26 (graduate II–S deferments).

"There is a third category of student deferment which applies to all university students, whether graduates or undergraduates. Under 32 C.F.R. § 1622.15(b) this type of deferment is designated as I–S. Its source is § 6(i) (2) of the Act, which has remained unchanged since 1951. * * *"

It is clear from the files and affidavits appended to the pleadings herein that plaintiffs have been denied fatherhood III–A deferments because of the defendants' belief that the Act prohibits the granting of such deferments to registrants who have received a graduate II–S deferment since June 30, 1967, relying upon Section 6(h) of the Act and Regulation 1622.30(a).

[1, 2] Such construction of both the Act and the Regulation is demonstrably erroneous. In the alternative, if only the Regulation is properly so construed, it is based upon an erroneous interpretation of the Act and unauthorized thereby. For the intent of the statute is clear. "No person," it reads in the quoted 6(h) (1) "who has received a student deferment under the provisions of this paragraph" (*this* paragraph being paragraph 1, the paragraph concerning the pre-baccalaureate, undergraduate II–S deferment) "shall thereafter be granted a deferment under this subsection" (subsection (h), authorizing fatherhood III–A deferments). But the crunch here is that these plaintiffs before us have never had a pre-baccalaureate, undergraduate II–S deferment under the Act. Hence they are not precluded from the fatherhood III–A by the express terms of the Act, and any construction or interpretation contrary thereto is obviously unlawful, as is any Regulation grounded upon such misconstruction. So far as the discretion of the Executive may be argued to support

defendants' interpretation, such discretion is not boundless. Thus the Executive could not, in his discretion, provide for the deferment of Michigan fathers but not Indiana fathers. It must, to be lawfully exercised, not conflict with the express provisions of the Act.

A similar question has been presented in the so-called I–S cases. Those cases involved the availability of the I–S deferment under Section 6(i) (2) of the Act for those students who (as the plaintiffs in the case before us) had received a graduate (but not an undergraduate) II–S deferment since the effective date of the Act, June 30, 1967. Regulation 1622.15(b) denies the right to a I–S deferment to a student who has previously received a II–S deferment, just as Regulation 1622.30(a) in the case before us denies a fatherhood III–A to registrants who have received a II–S. But upon a critical examination of the Act it has been clear to a number of courts, Ellis v. Hershey, 302 F.Supp. 347 (E.D.Mich. April 30, 1969): Bowen v. Hershey, 410 F.2d 962 (1st Cir. 1969); Carey v. Local Bd. No. 2, D.C., 297 F. Supp. 252, aff'd 412 F.2d 71 (C.A. 2, 1969); Foley v. Hershey, 409 F.2d 827 (7th Cir. 1969); Marsano v. Laird, 412 F.2d 65 (CA 2, 1969); that the Act forbade the granting of a I–S only to those students who had received an undergraduate II–S under Section 6(h) (1) of the Act, but not to those who had received a graduate II–S under the provisions of 6(h) (2) of the Act.

We are cited to portions of the legislative history tendered in explanation of the scheme of the statute, but we do not view the Act as involving the kind of ambiguity that warrants an examination of the legislative history for our guidance.

[3] The defendants challenge our jurisdiction, arguing that Section 10(b) (3) of the Act bars pre-induction review. Defendants' obstacle, of course, is Oestereich v. Selective Service System Board No. 11, 393 U.S. 233, 89 S.Ct. 414, 21 L.Ed.2d 402 (1968). But defendants seek to distinguish *Oestereich*. They rely primarily upon the concession by the Government found in that case. Thus, in this regard, the defendants argue

> "In his brief before the Supreme Court, the Solicitor General conceded that Oestereich was a full-time divinity student and recognized that he was therefore entitled to the unequivocal exemption afforded such registrants by Section 6(g) of the Act. The Supreme Court agreed and held that Section 10(b) (3) would not bar pre-induction judicial review in that case. The Court accepted the Solicitor General's assurance that *Oestereich* was entitled to the divinity student exemption and agreed that there was no statutory authorization for his reclassification pursuant to regulations which were triggered by "activities or conduct not material to the grant or withdrawal of the exemption" (*i.e.* Oestereich's status as a divinity student) 393 U.S. at 237, 89 S.Ct. 414. The Court therefore concluded that to compel one who was clearly *exempt* from military service to submit to such service (or to face criminal prosecution) in order to establish his "plain and unequivocal" and *uncontested* right to such an exemption would be unduly harsh, 393 U.S. at 238, 89 S.Ct. 414, and held Section 10(b) (3) to be inapplicable." (Page 4, Defendants' Brief. All emphasis in original.)

We attach no significance to the concession by the Government in that case. Gracious it may have been, but the resolution of this kind of question does not turn upon Government's grace. Nor, as we read the case, did the Supreme Court rely upon any confession of error by the Government. Rather the thrust of its opinion was that the "conduct of [the] Local Board [was] basically lawless." 393 U.S. at 237, 89 S.Ct. at 416. Moreover, here, as in *Oestereich*, "there is no exercise of discretion by a Board in evaluating evidence and in determining

whether a claimed exemption is deserved." *Id.* at 238, 89 S.Ct. at 416.

The defendants stress also that *Oestereich* involved a case of a statutorily granted exemption. But whether lawless action by a Local Board involves an exemption or a deferment, the action remains lawless. Neither dictionary definitions nor semantic subtleties control basic statutory rights. It is clear from the I–S cases heretofore cited that the denial of the statutory right to a II–S deferment under Section 6(i) (2) of the Act likewise calls for judicial review. We are aware, we note in passing, of Anderson v. Hershey, 410 F.2d 492 (CA. 6, 1969), which limits the holding of the invalidity of the delinquency regulations in *Oestereich* to those situations in which the delinquency regulations apply to statutory exemptions.

In summary, as to jurisdiction, this matter concerns, not a deferment resting in the discretion of a Local Board or Selective Service official, but a deferment mandated by regulation; there is no factual question (or mixed question of fact and law) presented to the Court for decision, but a question of law only. Such legal question is, as well, applicable to an entire class of registrants, not simply to one particular individual. A civil action, moreover, in this Court, is the only feasible opportunity which this class of registrants has to present before a competent forum their legal arguments to obtain a determination, for the entire class, of the validity, of their sought induction under these circumstances.

[4] Upon a consideration of these factors it is our conclusion under the teachings of *Oestereich* that we have jurisdiction, that the cause of action shall be maintained as a class action, Rule 23, Rules of Civil Procedure, and that Regulation 1622.30(a), interpreted by defendants as hereinabove described, is illegal because founded on an erroneous interpretation of the Act and unauthorised thereby.

Suitable orders may be presented.

Appendix "B"

MEMORANDUM

URBOM, Judge.

The plaintiff in this action is a June, 1969, law school graduate, married, and the father of a two-year-old daughter. The plaintiff attended Creighton University from his enrollment in September, 1963, until he received his baccalaureate degree in June, 1967, and during this entire period of undergraduate study he was deferred from military service because of a II–S deferment granted by his local Selective Service board. From September, 1966, until June, 1969, the plaintiff attended the Creighton University School of Law. Apparently the plaintiff's first year of law school was concurrent with his last year of undergraduate school. During this entire period of graduate study the plaintiff was again deferred from military service because of a II–S classification. From September 15, 1967, until his graduation the plaintiff's classification was graduate II–S under § 6(h) (2) of the Military and Selective Service Act of 1967. The plaintiff was married in November, 1967, and on July 2, 1968, became the father of a daughter, with whom he has maintained a bona fide family relationship in his home at all times since her birth. On June 12, 1968, the plaintiff notified his local board that his wife was pregnant and requested classification in Class III–A. On June 13, 1968, the local board notified the plaintiff that his II–S deferment would be continued. Thereafter the plaintiff undertook numerous renewed requests for classification in Class III–A and appeals at all administrative levels. The local board uniformly took the position that he was not entitled to a III–A fatherhood deferment and continued to classify the plaintiff in II–S during his law school education. After graduation from law school the plaintiff was classified I–A as available for induction. On April 30, 1970, the plaintiff received an order to report for induction on May 24, 1970. This induction date was subsequently postponed until June 12, 1970, at the request of the United States Attorney after the plaintiff filed this suit on May 15, 1970. On June 4, 1970, this court entered an order granting a preliminary injunction preventing plaintiff's induction into the armed forces until final disposition of this matter. The trial of the action on the merits was advanced and consolidated with the hearing of the application for preliminary injunction pursuant to Federal Rule of Civil Procedure 65(a) (2), briefs were submitted to the court, and oral arguments heard. The matter now stands ready for final determination.

I. NATURE OF *GREGORY v. HERSHEY* CLASS ACTION

The United States District Court for the Eastern District of Michigan on February 27, 1970, in Gregory et al. v. Hershey et al., —— F.Supp. ——, ruled in favor of the plaintiff-Selective Service registrants therein and an order was entered requiring the defendant-Selective Service officials to classify in Class III–A the named plaintiffs and all others similarly situated upon showing that they are members of the class of plaintiffs as defined in the order. Judge Talbot Smith in his "Judgment and Order in the Nature of Mandamus" dated February 27, 1970, defined the class of plaintiffs as:

> "* * * (A)ll Selective Service registrants who:
>
> (a) have a child or children with whom they maintain a bona fide family relationship in their homes, and
>
> (b) are not physicians, dentists, or veterinarians or in an allied specialist category, and
>
> (c) have not received an undergraduate II–S deferment under the Military Selective Service Act of 1967 (50 U.S.C. App. §§ 451–473) * * * but
>
> (d) have received a graduate II–S deferment under said Act * * *."

Judge Smith on February 27, 1970, also entered an "Order Determining the

Validity of Class Action." The court found, inter alia, that:

"2. The prerequisites to a class action as set forth in Rule 23(a) of the Rules of Civil Procedure have been satisfied, in that the class being represented is so numerous that joinder of all members is impracticable, there are questions of law and fact common to the class, the claims or defenses of the representative parties are typical of the claims or defenses of the class, and the representative parties will fairly and adequately represent the interests of the class;

"3. The prosecution of separate actions, by individual members of the class would create a risk of inconsistent or varying adjudications, which Rule 23(b) (1) of the Rules of Civil Procedure seeks to avoid, with respect to individual members of the class, would establish incompatible standards of conduct for the defendants, and such incompatible standards make declaratory relief with respect to the class as a whole appropriate;

"4. The defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final relief in the nature of mandamus and corresponding declaratory relief with respect to the class as a whole, as contemplated by Rule 23(b) (2) of the Rules of Civil Procedure; and that

"5. Notification of members of the class is impractical because of the number of members and the absence of any reasonable way of identifying them; therefore

"It is hereby ordered, that the above cause of action shall be allowed to be maintained as a class action. * * *"

These orders of the federal court in Michigan are found as copies attached to the complaint and admitted to as true by the defendants in their answer. See filing No. 11.

[1] From these orders it appears that the court in *Gregory* was satisfied that the action was a class action within the meaning of Rule 23(b) (2) of the Federal Rules of Civil Procedure and made appropriate findings to that effect. This court, then, cannot and will not look behind those findings. The validity of the class action was a subject for inquiry at the time of its inception and the trial court was the body uniquely in the position to weigh the relevant facts and circumstances requisite to a Rule 23 action. Those facts are not now before this court and the court can make no judgment as to the validity of the *Gregory* action as a class action. This court shall then consider Judge Smith's findings conclusive and assume that *Gregory* was a class action.

II. JURISDICTION OF THE COURT

The defendants have by way of answer challenged the jurisdiction of this court to render a decision in this case involving preinduction judicial review of a Selective Service classification. Section 10(b) (3) of the Selective Service Act of 1967 states:

"No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution. * * *" 50 U.S.C. App. § 460(b) (3)

The defendants contend that this flat prohibition against judicial review precludes this court's jurisdiction over the subject matter. The plaintiff alleges, inter alia, that since Judge Smith found the *Gregory* case to be a valid class action and this court assumes its validity as such, the case at hand becomes a matter of enforcement of the judgment of the Michigan class action and this court's only task is to determine whether the plaintiff is a member of the class of plaintiffs named in the *Gregory* case. This position would at least infer that the court must conclusively presume the prior court's jurisdiction. The court points out that the issue is not so easily disposed of as suggested by either party.

Although § 10(b) (3) appears to prohibit flatly any and all judicial review

except as a defense to a criminal prosecution, certain exceptions have been carved out of that broad prohibition. The first exception to be recognized was the right to habeas corpus following induction. See Estep v. United States, 327 U.S. 114, 66 S.Ct. 423, 90 L.Ed. 567 (1946), and Witmer v. United States, 348 U.S. 375, 377, 75 S.Ct. 392, 99 L.Ed. 428 (1955). The most recent area of exception created by the Supreme Court of the United States is that found in Oestereich v. Selective Service System, 393 U.S. 233, 89 S.Ct. 414, 21 L.Ed.2d 402 (1968). That case involved a registrant who was entitled to a IV–D classification under the Selective Service Act and, after participation in anti-war activities, his IV–D exemption was revoked and the registrant was reclassified I–A. In holding that the local Selective Service board could not revoke the mandatory IV–D classification and in allowing judicial review the Supreme Court stated:

> "We deal with conduct of a local Board that is basically lawless. * * In such instances, as in the present one, there is no exercise of discretion by a Board in evaluating evidence and in determining whether a claimed exemption is deserved. The case we decide today involves a clear departure by the Board from its statutory mandate. To hold that a person deprived of his statutory exemption in such a blatantly lawless manner must either be inducted and raise his protest through habeas corpus or defy induction and defend his refusal in a criminal prosecution is to construe the Act with unnecessary harshness. * * *"

In *Gregory*, 311 F.Supp. 1, the court was also faced with the bar to judicial review found in § 10(b) (3). The court found jurisdiction for review of the *Gregory* classification because, as in *Oestereich*, the "conduct of the local Board [was] basically lawless." In summarizing Judge Smith stated:

> "* * * (A)s to jurisdiction, this matter concerns, not a deferment resting in the discretion of a Local Board or Selective Service official, but a deferment mandated by regulation; there is no factual question (or mixed question of fact and law) presented to the Court for decision, but a question of law only. Such legal question is, as well, applicable to an entire class of registrants, not simply to one particular individual. A civil action, moreover, in this Court, is the only feasible opportunity which this class of registrants has to present before a competent forum their legal arguments to obtain a determination, for the entire class, of the validity, of their sought induction under these circumstances.
>
> "Upon a consideration of these factors it is our conclusion under the teachings of *Oestereich* that we have jurisdiction. * * *"

[2] This court doubts that the *Oestereich* case is controlling and dispositive of the jurisdictional question found in *Gregory*. In *Oestereich* there was a clear statutory mandate requiring the local board to award the registrant a IV–D exemption and, moreover, the local board had taken that exemption away from the registrant apparently in order to discipline him for his anti-war activities. The Supreme Court found the action taken by the local board to be "blatantly lawless." Such is not the clear-cut circumstance in *Gregory* and the present case. In the *Gregory* class action the registrants were attempting to obtain a III–A classification as a matter of right. However, under § 6 (h) (2) of the Act a deferment because of paternity is not mandatory; rather, the President was authorized to provide for such a deferment if he chose to do so. The President sought to establish the fatherhood deferment in 32 C.F.R. § 1622.30, in pertinent part as follows:

> "(a) In Class III–A shall be placed any registrant who has a child or children with whom he maintains a bona fide family relationship in their home * * * except that a registrant who is classified in Class II–S

after the date of enactment of the Military Selective Service Act of 1967 shall not be eligible for classification in Class III–A under the provisions of this paragraph."

This regulation was considered in *Gregory* to be rendered ambiguous because it makes no distinction between the graduate and undergraduate II–S classifications. Section 6(h) (2) of the Military Selective Service Act of 1967, which authorizes the deferment of fathers, also authorizes the deferment of graduate students, while § 6(h) (1), which provides for the deferment of undergraduate students, specifically excludes them from further deferment except for graduate study, deferrable employment or extreme hardship. The court in *Gregory* found that the only reasonable construction to be placed on the regulation when read with the Act is that the President intended II–S as mentioned in the regulation, supra, to mean *undergraduate* II–S, thereby preserving the availability of the III–A classification to those registrants who had received a graduate II–S classification since the passage of the Act. Apparently the court considered the "authorization" in § 6(h) (2) to be an obligatory command which required the deferment of all fathers except those specifically excluded by the Act. The court held that the class of plaintiffs therefore were entitled to the III–A classification as a matter of right because of the mandatory term "shall" used in the regulation and that the Selective Service System's denial of that classification to these registrants amounted to unlawful conduct.

I am not of the opinion that (1) the *Gregory* court's construction of the regulation with the Act is the only construction reasonable or possible, or (2) the action of the local board in withholding a III–A classification in such a situation where the regulation is ambiguous amounts to the "blatantly lawless" conduct found in *Oestereich* sufficient to surmount the blanket prohibition against judicial review found in § 10(b) (3) of the Act. Nevertheless, I am convinced that I am not at liberty to declare that the *Gregory* court had no jurisdiction over the subject matter of that action and the present action. Similarly, I am not free to declare that this court has no jurisdiction to enforce the judgment entered in the *Gregory* case.

The Supreme Court of the United States has articulated the following standard concerning the res judicata effect of a prior judgment court's determination of subject matter jurisdiction:

> "Following the *Baldwin* case [Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 51 S.Ct. 517, 75 L.Ed. 1244 (1931), which held that where an original judgment forum fully litigated the issue of jurisdiction over the person a subsequent court enforcing the original judgment is bound by the original court's finding of jurisdiction], this Court soon made clear in a series of decisions that the general rule is no different when the claim is made that the original forum did not have jurisdiction over the subject matter. Davis v. Davis, 305 U.S. 32, 59 S.Ct. 3, 83 L.Ed. 26; Stoll v. Gottlieb, 305 U.S. 165, 59 S.Ct. 134, 83 L.Ed. 104; Treinies v. Sunshine Mining Co., 308 U.S. 66, 60 S.Ct. 44, 84 L.Ed. 85; Sherrer v. Sherrer, 334 U.S. 343, 68 S.Ct. 1087, 92 L.Ed. 1429. In each of these cases the claim was made that a court, when asked to enforce the judgment of another forum, was free to retry the question of that forum's jurisdiction over the subject matter. In each case this Court held that since the question of subject-matter jurisdiction had been fully litigated in the original forum, the issue could not be retried in a subsequent action between the parties." Durfee v. Duke, 375 U.S. 106, 112, 84 S.Ct. 242, 245, 11 L.Ed.2d 186 (1963)

[3] Narrowly speaking, it may be true that the judgment of a court is assailable for want of jurisdiction over the subject matter at any time the judg-

ment is sought to be enforced. Thompson v. Whitman, 18 Wall. 457, 85 U.S. 457, 21 L.Ed. 897 (1873). However, it is also true that "the burden of undermining the verity [of the judgment court's finding of jurisdiction] rests heavily on the assailant." Williams v. North Carolina, 325 U.S. 226 at 233–234, 65 S.Ct. 1092, 1097, 89 L.Ed. 1577 (1944). The standard provided for examining the judgment of a prior court is as follows:

> "A court does not have the power, by judicial fiat, to extend its jurisdiction over matters beyond the scope of the authority granted to it by its creators. There must be admitted, however, a power to interpret the language of the jurisdictional instrument and its application to an issue before the court. Where adversary parties appear, a court must have the power to determine whether or not it has jurisdiction of the person of a litigant, or whether its geographical jurisdiction covers the place of the occurrence under consideration. Every court in rendering a judgment tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter. An erroneous affirmative conclusion as to the jurisdiction does not in any proper sense enlarge the jurisdiction of the court until passed upon by the court of last resort, and even then the jurisdiction becomes enlarged only from the necessity of having a judicial determination of the jurisdiction over the subject matter. When an erroneous judgment, whether from the court of first instance or from the court of final resort, is pleaded in another court or another jurisdiction the question is whether the former judgment is *res judicata*. After a Federal court has decided the question of the jurisdiction over the parties as a contested issue, the court in which the plea of *res judicata* is made has not the power to inquire again into that jurisdictional fact. We see no reason why a court, in the absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the court making the earlier determination on an actual contest over jurisdiction between the parties, did have jurisdiction of the subject matter of the litigation. In this case the order upon the petition to vacate the confirmation settled the contest over jurisdiction.
>
> "Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first." Stoll v. Gottlieb, 305 U.S. 165, 171, 172, 59 S.Ct. 134, 137, 83 L.Ed. 104 (1938)

[4] A reading of the *Gregory* decision makes it apparent that the court was specifically interpreting "the language of the jurisdictional instrument and its application to an issue before the court." Stoll v. Gottlieb, supra, page 172, 59 S.Ct. page 137. The matter of jurisdiction was litigated in the federal district court in Michigan and this court's further examination would merely retry an issue previously determined. "There is no reason to expect that the second decision will be more satisfactory than the first."

> As Professor Moore ably summarizes: "* * * In brief, then, except for the rare case where power is plainly usurped, if a court has the general power to adjudicate the issues in the class of suits to which the case belongs then its interim orders and final judgment, whether right or wrong, are not subject to collateral attack, so far as jurisdiction over the subject matter is concerned." 7 Moore's Federal Practice, ¶ 60.25[2], p. 266

Although noting my disagreement with the finding of jurisdiction in the *Gregory* decision, this court will not retry the issue of subject matter jurisdiction. The *Gregory* court did not "plainly usurp" power in finding jurisdiction; rather, the court found its jurisdiction through a thorough and able examination of the relevant statutes, regulations and Supreme Court decisions. That finding will be honored in this court.

III. BINDING EFFECT OF THE *GREGORY* CLASS ACTION ON THE PARTIES

In the case at bar the plaintiff's first claim for relief is that this court should enforce the judgment of the United States District Court for the Eastern District of Michigan in Gregory v. Hershey. As has previously been stated, that action was found to be a valid class action within the meaning of Rule 23(b) (2). The plaintiff seeks to have the *Gregory* decision considered as res judicata here.

[5] The general rule is that:

> "A person who is one of a class of persons on whose account action is properly brought or defended in a representative action or defense is bound by and entitled to the benefits of the rules of res judicata with reference to the subject matter of the action." Restatement of Judgments, § 86 (1942)

The Supreme Court of the United States has uniformly followed the rule with respect to true class suits. "If the federal courts are to have the jurisdiction in class suits to which they are obviously entitled, the decree when rendered must bind all of the class properly represented." Supreme Tribe of Ben-Hur v. Cauble et al., 255 U.S. 356, 367, 41 S.Ct. 338, 342, 65 L.Ed. 673 (1921).

Although Rule 23 was amended in 1966, that general rule has continued to be followed and the binding effect of the judgment on the members of the class is beyond doubt. The only provision made in Rule 23 *not* to bind members of the class is under Rule 23 (c) (2) where a member of a 23(b) (3) class, after having received notice, may elect to be excluded from the class. However, to be so excluded the member must make a request to the court by a certain date to be excluded or be bound by the decision. Rule 23(c) (3) appears to clearly countenance and accept the res judicata effect by stating:

> "The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class."

That construction has been accepted by other federal courts:

> "A judgment in a class action brought under Rule 23, as amended, is res judicata as to the whole class except as to those members of a (b) (3) type of class action who specifically request to be left out of the action." Snyder v. Harris, 268 F.Supp. 701 (U.S.D.C.E.D.Mo.1967), aff'd 390 F. 2d 204 (8 Cir.), aff'd 394 U.S. 332, 89 S.Ct. 1053, 22 L.Ed.2d 319, rehearing denied 394 U.S. 1025, 89 S.Ct. 1622, 23 L.Ed.2d 50.

[6] This court, finding that the questions of validity of the class suit and jurisdiction have previously been litigated, now finds that the parties should be bound to the prior judgment by the principles of res judicata.

CONCLUSION

As the court in the *Gregory* case made appropriate and requisite findings determining the validity of that class action and the defendants here have admitted by way of answer that the plaintiff is a member of the class described in *Gregory*, this court need go no further.

The judgment in the *Gregory* class action is binding on the parties, and this court shall give effect to that judgment.

No examination needs to be made of the plaintiff's second claim for relief,

which would relitigate the merits of the issues originally litigated in *Gregory*. To do so would subvert the interests of justice and judicial economy that are the purposes of the class action.

This memorandum shall constitute findings of fact and conclusions of law.

An appropriate order will be entered granting relief to the plaintiff.

JUDGMENT

Appendix "c"

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 20715 September Term, 1970

Thomas E. Whitmore, Appellee,	)	
vs.	)	Appeal from the United States District Court for the District of Nebraska
Curtis W. Tarr, National Director of Selective Service, et al, Appellants.	)	

This appeal from the United States District Court for the District of Nebraska comes before the Court on consideration of appellants' motion for summary reversal. The Court has carefully considered the motion together with appellee's response and motion for stay of further proceedings.

Being fully advised in the premises it is now here ordered:

1) Judgment of the District Court dated October 23, 1970 is hereby vacated without prejudice.

2) The cause is remanded to the United States District Court for the District of Nebraska for further consideration in the light of Gregory v. Tarr, ___F.2d____ (6th Cir., No. 20497, January 26, 1971 (reversing Gregory v. Hershey, 311 F.Supp. 1 (E.D. Mich.).

February 24, 1971

No. 20497

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

STEPHEN L. GREGORY, et al.,
Plaintiffs-Appellees,
v.
CURTIS W. TARR, NATIONAL DIRECTOR OF SELECTIVE SERVICE, et al.,
Defendants-Appellants.

APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided and Filed January 26, 1971.

Before: WEICK, McCREE, and BROOKS, Circuit Judges.

WEICK, Circuit Judge. Plaintiffs filed a class action in the District Court challenging the application and validity of a Selective Service Regulation defining eligibility of draft registrants for what is known as a "fatherhood deferment under deferment classification III-A.[1] The plaintiffs are draft regis-

[1] Title 32, Code of Federal Regulations, section 1622.30 (January 1 1970) provides, in pertinent part:

> "(a) In Class III-A shall be placed any registrant who has a child or children with whom he maintains a bona fide family relationship in their [sic] home and who is not a physician, dentist or veterinarian, or who is not in an allied specialist category which may be announced by the Director of Selective Service after being advised by the Secretary of Defense that a special requisition under authority of section 1631.4 of these regulations will be issued by the delivery of registrants in such category, except that a registrant who is classified in Class II-S after the date of enactment of the Military Selective Service Act of 1967 shall not be eligible for classification in Class III-A under the provisions of this paragraph."

The fatherhood deferment provided by 32 C.F.R. § 1622.30(a) has been suspended by Executive Order 11,527 subsequent to the filing of the present case, but the order provides that those entitled to the deferment who requested it prior to the date of the Executive Order shall still be entitled to it thereafter. Exec. Order No. 11,527, 35 F.R. 6571, 6572 (April 23, 1970).

trants who have been re-classified I-A (available for military service) and ordered to report for induction. The defendants are the National Director of Selective Service, the State Directors of Selective Service of the states of Michigan, Indiana, Illinois and Minnesota, and a number of local boards and their members in said states. The class sought to be protected is limited to Selective Service registrants who have one or more children with whom they maintain a bona fide family relationship in their homes, who are not physicians, dentists or veterinarians or in an allied specialist category, and who have a post-baccalaureate student deferment (graduate II-S), but have not received a pre-baccalaureate student deferment (undergraduate II-S), under authority of the Military Selective Service Act of 1967, 81 STAT. 100, 50 U.S.C.A. APP. § 451 *et seq.* Plaintiffs seek a declaratory judgment that the challenged regulation is invalid, at least as it is presently applied, and a mandatory injunction ordering classification in Class III-A (fatherhood deferment) for themselves and the class they seek to protect. Plaintiffs also seek to have declared void the orders to report for induction which each of them has received. Jurisdiction is allegedly founded on 28 U.S.C.A. §§ 1331, 1343, 1361, & 2201-02.

The action was submitted to the court upon the plaintiffs' motion for summary judgment and the defendants' motion to dismiss for lack of subject-matter jurisdiction and, in the alternative, for failure to state a claim upon which relief could be granted. The court had previously determined, upon plaintiffs' motion, the validity of the class action. The district court filed an opinion granting the plaintiffs' motion for summary judgment in which it determined that it had subject-matter jurisdiction over the action and that plaintiffs had presented an issue on which they were entitled to relief.[2]

[2] Defendants have not questioned the validity of the class action although no notice to the members of the class was given as provided by Rule 23, Fed.R.Civ.P., nor have they questioned the jurisdiction of the court over the State Directors of Selective Service, the Local

Defendants appeal from that judgment, contending that the federal courts are deprived of jurisdiction of this case by virtue of section 10(b)(3) of the Military Selective Service Act of 1967 [hereinafter "the Act"], 50 U.S.C.A. APP. § 460(b)(3), and that the plaintiffs were properly denied fatherhood deferments under the authority of section 6(h)(2) of the Act, 50 U.S.C.A. APP. § 456(h)(2), and the pertinent regulation, 32 C.F.R. § 1622.30(a)(1970). We reverse.

In considering the 1967 Act, Congress was concerned about the decisions of some federal courts permitting earlier review of Selective Service decisions than had previously been thought permissible. Thus, Congress statutorily imposed the rule of judicial review which presently defines jurisdiction:

> "No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President except as a defense to a criminal prosecution [for refusing to report] after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided*, That such review shall go to the question of jurisdiction herein reserved to local boards, appeal boards, and the President only

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Boards and their members for the states of Indiana, Illinois and Minnesota.

Allowing class actions to be brought by Selective Service registrants to enjoin not only their own induction, but the induction of others similarly situated throughout the nation, can have a far-reaching and disruptive effect on the operation of the Selective Service System. In *Whitmore* v. *Tarr* (D.Neb. Civ. 1963L, decided October 22, 1970), the court held that it was bound by the decision of the District Court in the present case on the ground of res adjudicata and enjoined the induction of a Nebraska registrant. In *Germonprez* v. *Director of Selective Service* (D.D.C. Civ. 1855-70, decided July 8, 1970), the court issued a preliminary injunction restraining the induction of a Kansas registrant on the basis of the present case. Query: Suppose that the District Court in the present case had ruled that the plaintiffs and others similarly situated were not entitled to III-A classification. Would such a decision be binding on a registrant from another state who had no notice of the action nor opportunity to defend against it? In *Pasquier* v. *Tarr*, (W.D.La. Civ. 70-2056, decided October 14, 1970), the court declined to follow the decision of the district court in the present case.

> when there is no basis in fact for the classification assigned to such registrant." 50 U.S.C.A. APP. § 460(b)(3) (1968).

As interpreted, the constitutionality of this provision has been upheld. *Clark* v. *Gabriel*, 393 U.S. 256 (1968). It has long been recognized that Congress has a legitimate interest in protecting from litigious delays and interruptions a governmental activity so inextricably intertwined with national security as the procurement and training of military personnel. *See, e.g. Falbo* v. *United States*, 320 U.S. 549 (1944). In interpreting section 10(b)(3) of the Act, however, the Supreme Court has held that a literal interpretation of the provision was not justified, in *Oestereich* v. *Selective Serv. Bd.*, 393 U.S. 233 (1968). A literal reading would, in the first instance, suspend the constitutionally protected writ of habeas corpus. 393 U.S. at 238. The Court also concluded that Congress did not intend to preclude pre-induction judicial review in the special circumstances presented by *Oestereich* and *Breen* v. *Selective Serv. Bd.*, 396 U.S. 460 (1970).

In *Oestereich*, a divinity student who was unquestionably exempted by statute from eligibility for induction, was nonetheless reclassified I-A on the authority of the now-defunct delinquency regulations for having turned in his draft card in protest of the Vietnam War. Oestereich sought a permanent injunction prohibiting his induction. His complaint was dismissed by the district court for lack of jurisdiction under authority of section 10(b)(3), and the United States Court of Appeals for the Tenth Circuit affirmed. The Supreme Court reversed, holding that pre-induction review was not precluded where the action of the local board was "blatently lawless" and beyond its statutory authority. *Breen* reaffirms the principle of *Oestereich* where a registrant had a statutory deferment rather than a statutory exemption and the delinquency regulations were used to punish him for a draft card turn-in.

Contemporaneous with *Oestereich*, the Court announced its decision in *Clark* v. *Gabriel, supra*, holding that pre-induction

judicial review was not available, except as a defense to a criminal prosecution, where the local board exercised, as contemplated by the statutory scheme, its judgment and discretion in granting or withholding certain categories of deferments. Plaintiffs seek to bring their allegations within the *Oestereich-Breen* exception to section 10(b)(3). In order to determine which line of decisions will control the present controversy, it is necessary to pierce the pleadings and determine precisely what category is raised by the merits of this controversy. *Stella* v. *Selective Service Board*, 427 F.2d 887, 889 (2nd Cir. 1970).

The district court was of the opinion that it had jurisdiction since the question of whether the plaintiffs and the class they represent should be granted fatherhood deferments was not one committed to the discretion of the local boards and since no mixed question of law and fact or pure question of fact was presented to the Court for determination. The court then held that the regulation should be interpreted to refer only to undergraduate student deferments or, in the alternative, that the regulation was inconsistent with the Act. Having made this determination, the court upheld its jurisdiction since the action of the local boards was "basically lawless" under the proper view of the regulation and the Act. The plaintiffs support the district court's determinations by urging essentially two alternative grounds. They contend that, properly interpreted, the regulation denies fatherhood deferments only to those who have received *undergraduate* II-S deferment since the effective date of the Act. They offer two reasons for the suggested interpretation — that the ambiguity of the regulation should be construed to fit the explicit statutory denial of fatherhood deferments to those having obtained undergraduate deferments or that the regulation was promulgated by the President under a mistaken view that the law required deferments to be denied all registrants having obtained a student deferment, whether graduate or undergraduate. We can see no reason to accept the plaintiffs' invitation to interpret the regulation. It is plainly worded and appears in Title 32 im-

mediately following the regulations regarding separate undergraduate and graduate student deferments, which were promulgated at the same time as the regulation in question. It is difficult to imagine, under these circumstances, how the Executive could have been unaware of the difference between undergraduate and graduate II-S deferment.

However, the plaintiffs also contend that the regulation is invalid if given its literal meaning as inconsistent with the statutory scheme. This strikes closer to our view of *Oestereich*, that only statutorily unauthorized actions of the Selective Service are open to pre-induction judicial review except as a defense to a criminal prosecution. However, this case falls short of the mark. Under the new statutory scheme enacted in 1967, two new student deferment categories were created. Section 6(h)(1) of the Act provides that "the President *shall* . . . [defer] persons satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning. . . . A deferment granted to any person under authority of the preceding sentence *shall continue* until such person completes the requirements for his baccalaureate degree . . ." (emphasis added). However, the Act does not similarly create graduate or fatherhood deferments by its own force alone. Rather, in section 6(h)(2) of the Act, the President is *authorized* to provide for deferment of graduate students "under such rules and regulations as he may prescribe. . . ." The same paragraph further provides that:

> ". . . [T]he President is also authorized, under such rules and regulations as he may prescribe, to provide for the deferment . . . *of any or all categories* of persons who have children, or wives and children, with whom they maintain a bona fide family relationship in their homes." (Emphasis added).

Thus, both the graduate student deferment and the fatherhood deferment are matters of Executive grace which can be made subject to any reasonable conditions, rather than matters of statutory right. The Executive has exercised its discretion

to provide for both graduate deferments and fatherhood deferments, but has pre-conditioned the latter deferment on not having requested and received a graduate student deferment so as to preclude the "pyramiding" of deferments into complete exemption from military service. Clearly, the exercise of this discretion expressly bestowed upon it by Congress does not involve the Executive or the Selective Service System in conduct unauthorized by statute, as was envisioned by the Court in the *Oestereich* decision. To the contrary, *Oestereich* presented a situation where the Selective Service System attempted to exercise punitive powers which Congress had not given it, having already prescribed a set of criminal penalties for violation of the Act. Here, the Act expressly bestows upon the Executive the discretion the exercise of which is challenged.

The judgment of the district court is reversed, and the cause is remanded with instructions to dismiss the complaint.

Reversed.